IN THE

Supreme Court of the United States

October Term, 1968

No. ~~1488~~ 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

Introduction—Interest of *Amicus*

The District Attorney of New York County supports the petition for a writ of certiorari filed by the Attorney General of the State of New York, not only because one of the respondents was convicted in New York County of a serious crime, but because the issue presented directly affects the cases of numerous State prisoners who, being

the worst offenders, are still in custody. For example, on an entirely conclusory habeas corpus claim that "he was coerced into signing a statement and confessing the crime" (petition for certiorari, Appendix A, p. 30), respondent Wilbert Ross, an acknowledged murderer on whose behalf the Circuit court entered its principal ruling, has been granted an evidentiary hearing on the issue of voluntariness of the "statement," notwithstanding the complete absence of any claim of coercion before the case became final, and although the "statement," if any, was never introduced in evidence, since Ross pleaded guilty. Thus the Circuit court, repudiating long-standing decisions of the New York Court of Appeals, has needlessly extended to countless State prisoners an open invitation to come to the courtroom for a hearing in cases which were reasonably considered closed, an invitation redeemable merely upon presentation of easily drafted claims as to inadmissibility of evidence, and as to the subjective "motivation" for pleas of guilty.

ARGUMENT

Jackson v. *Denno* should not be applied retroactively to defendants who pleaded guilty.

The United States Court of Appeals for the Second Circuit, by a 6-3 vote, has expanded drastically the opportunity to attack a conviction based upon a plea of guilty, if the plea was entered prior to *Jackson* v. *Denno,* 378 U.S. 368 (1964). The Court ruled that an evidentiary hearing is required in a State court when a petitioner alleges sufficiently that his plea of guilty, entered before the *Jackson* ruling on June 22, 1964, was "substantially motivated" by

a coerced confession. "The conviction would stand, of course," the Circuit court reassured, "if the State court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession" (*id.* at n. 4).

The crux of the Court of Appeals' decisions was that a non-jury hearing as to voluntariness of a confession, "constitutionally acceptable" under present standards, was not required and available in New York State until the *Jackson* decision, nine years after the respondent Ross's plea of guilty (petition for certiorari, Appendix B, pp. 57, 59-60; see also concurring opinion, pp. 66-7). Hence, a *Jackson-Denno* hearing was not deliberately "waived" by the plea. *Ergo,* the plea of guilty is tainted. This syllogism, the last word of the federal courts in this jurisdiction,* has devastating logical consequences. Under the reasoning of the Circuit court, every judgment entered upon a plea of guilty is subject to attack if subsequently there was a change in the constitutional law relating to criminal procedure or admissibility of evidence. In this instance, respondents were held to be entitled retroac-

* The decisions of the United States Court of Appeals for the Second Circuit are, of course, binding upon the District Courts in the Circuit, from which State prisoners may seek writs of habeas corpus. Further, the reasoning of the decisions would extend to cases of State prisoners convicted in at least 14 states other than New York, and federal prisoners convicted in 6 federal judicial circuits, for these jurisdictions lacked an acceptable *Jackson*-type hearing prior to June 22, 1964. See *Jackson* v. *Denno, supra* at 406 (dissenting opinion of Mr. Justice BLACK). Some New York State trial judges, unpersuaded by the logic of the Circuit court in the instant cases, have declined to hold hearings on similar petitions, pending further word as to the efficacy of these holdings. See, *e.g., People* v. *Terry,* N.Y.L.J. April 22, 1969, p. 18, col. 6 (Sup. Ct. 1969); *People* v. *Serra,* N.Y.L.J. June 4, 1969, p. 33, col. 8 (Sup. Ct. 1969).

tively to a *Jackson* hearing since none was available when they pleaded guilty. By the same token, defendants who pleaded guilty prior to *Bruton* v. *United States,* 391 U.S. 123 (1968) would be entitled to petition for an evidentiary hearing to determine whether their pleas were "substantially motivated" by an expectation that they would be tried jointly with other defendants whose confessions implicated them.

In so ruling, the Court of Appeals misconstrued the nature of the "waiver" which underlies an acceptable plea of guilty. The validity of a plea of guilty in cases disposed of prior to 1964 is totally unaffected by the absence of a deliberate, intentional "waiver" of a *Jackson* hearing. The only previously announced constitutional rights which must be knowingly and understandingly "waived" for the plea of guilty to be accepted are the rights recently listed by this Court in *Boykin* v. *Alabama,* —— U.S. ——, 37 USLW 4474 (1969):

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U.S. 1. Second is the right to trial by jury. *Duncan* v. *Louisiana,* 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas,* 380 U.S. 400." *Id.* at 4476.

Moreover, defendants need not be shown to have knowingly waived every procedural right which subsequent judicial decisions have added. In effect, a plea of guilty relinquishes the benefit of subsequently announced procedural rights

which, as here, do not affect the reliability of the plea of guilty—even if those rights are applied retroactively to cases where there was a trial. This is implicit in the bargain which is struck when a defendant foregoes his right to a trial, as in the instant cases, in return for the benefits of a lesser plea. As this court recently noted, "some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique [prospective decision-making] provides for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins* v. *Delaware*, —— U.S. ——, 37 USLW 4458, 4459 (1969). Indeed, one wonders whether this Court, which was closely divided in *Jackson*, could have contemplated that its novel decision would be construed to require evidentiary hearings as to the admissibility of evidence at trial where there never was a trial. In a criminal justice system which disposes of "about 80% of all charges of serious crime and of about 95% of all convictions of such crimes" by pleas of guilty, and which encourages progress and procedural reforms through judicial decisions, any other view is intolerable and not constitutionally required (*cf.* petition for certiorari, Appendix B, page 72 [dissenting opinion of LUMBARD, C.J.]).

The Circuit court's decisions in the instant cases not only misinterpret the "waiver" implicit in a plea of guilty, they conflict with settled principles of retroactivity, which establish the inapplicability of new rulings such as *Jackson* v. *Denno* to cases which had already been disposed of

upon pleas. In determining questions of retroactivity, this Court has applied three now-familiar criteria:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967); see also *Halliday* v. *United States,* —— U.S. ——, 23 L.Ed.2d 16, 19 (1969).

Applying these tests, it has been held that the application to State trials of the Sixth Amendment right to a jury trial for serious offenses is not retroactive to trials which have already occurred without a jury. *DeStefano* v. *Woods,* 392 U.S. 231 (1968). Judicial extension of the right to counsel at pre-trial identification proceedings is inapplicable to line-ups which have already occurred. *Stovall* v. *Denno, supra.* The *Miranda* decision does not apply to trials that had already begun when the Supreme Court prescribed the *Miranda* warnings, or to retrials of cases which originally had been tried prior to the *Miranda* decision. *Jenkins* v. *Delaware, supra*; *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Similarly, recent changes in rulings as to the admissibility of evidence obtained by wiretapping do not apply to wiretapping which has already occurred. *Desist* v. *United States,* 394 U.S. 244 (1969).

With respect to the first criterion of retroactivity, the purpose of the *Jackson* decision was provision for a "reliable" procedure for testing federal claims as to voluntariness of a confession "offered in evidence at the trial." 378 U.S. at 377. Retroactivity is not indicated where there was no trial at all, and no pre-trial confession was ad-

vanced as proof. A plea of guilty "serves as a stipulation that no proof by the prosecution need be advanced * * * It supplies both evidence and verdict, ending the controversy * * *." *Boykin* v. *Alabama, supra,* 37 USLW at 4476, n. 4. Since requiring hearings before judges without a jury on the question of voluntariness of a confession offered at trial does not involve the reliability of the judgment-rendering process where the judgment is based on a plea of guilty, there is no need for retroactivity. By contrast, the holding in *Gideon* v. *Wainright,* 372 U.S. 335 (1963), that indigent defendants are entitled to free counsel, deserved retroactive application even where the convictions rested upon pleas of guilty, for the reliability of an uncounseled plea of guilty is suspect. But it is difficult to conceive of any other case, involving newly announced rights applicable to a trial, which should be applied retroactively to pleas of guilty. Indeed, the majority of the court below suggests not one whit that its ruling is related to the reliability of the plea of guilty. Nor did the respondents suggest in their habeas corpus petitions any relationship between the reliability of their pleas of guilty and the unavailability of a *Jackson* hearing prior to 1964, when their pleas were entered. The remoteness from the question of reliability of the plea is highlighted by considering the status of the law when the plea was entered, prior to the *Jackson* decision. In 1955, when respondent Ross pleaded, methods reasonably considered adequate were available for testing voluntariness of confessions offered at trial, as was pointed out below in the dissenting opinion of Judge Friendly. Hence, the unavailability of an alternative method could not have affected the truthfulness of the plea.

It is also clear that the second test of retroactivity, reliance by public officers, warrants prospectivity of *Jackson* where there was a plea of guilty. Judges, prosecutors, and others responsible for the administration of justice were entitled to rely on authoritative pronouncements by this Court and the New York Court of Appeals upholding the existing State procedure for testing voluntariness of confessions that were offered at trial. See *Stein* v. *New York*, 346 U.S. 156 (1953); see also *Jackson* v. *Denno*, *supra* at 395. The court below offered no suggestion as to how a plea of guilty could have been taken in 1955 in a manner which would now be considered acceptable by a majority of that court.

Finally, substantial disruption in the administration of justice would occur if cases disposed of upon pleas of guilty prior to 1964 had to be reopened for evidentiary hearings as to the admissibility of evidence. The petition for certiorari and the dissenting opinion of Chief Judge LUMBARD document the enormous number of convictions which would be affected by the broad rulings of the Second Circuit.

It is no reassurance to assert, as was done in the majority opinion in the *Ross* case, that after a "full * * * evidentiary hearing" the conviction could stand if "the confession was voluntary" or "the plea was not substantially motivated by the confession." Requiring hearings is itself a major disruptive factor. To add innumerable such cases to the calendars of the Supreme Court in New York City and other busy trial courts, where the backlogs of indictments awaiting trial are already large (in New York

County the typical homicide case is tried a year after the indictment), is an unreasonable, unnecessary burden on the administration of justice. With the facilities of the courts, prosecutors, police and defense bar already overtaxed with pre-trial hearings on issues created by recent decisions, an additional weight should not be imposed without urgent reasons not apparent in the present case. Nor may it lightly be assumed that the issues set forth by the Circuit court could readily be litigated. In cases at least 5 years old, the voluntariness of the confession, and even its very existence, are questions not readily susceptible of resolution in cases entered upon pleas of guilty, where testimony and records have not been preserved, and memories are understandably stale. Similarly, an evidentiary hearing as to whether a plea of guilty prior to 1964 was "substantially motivated" by a confession is an inquiry into the metaphysical. Indeed, if the Circuit court's opinion in *Ross* is carried to its logical conclusion, the defendant should prevail if he thought the confession was "coerced" and pleaded guilty substantially because of the confession, regardless whether or not the confession was in fact voluntary.

Assuming that this examination as to the confession, or as to the motivation for the plea, resulted in a nullification of the plea of guilty, the State would be seriously handicapped in its efforts to prosecute the underlying criminal charge. The Circuit court overlooked "society's legitimate concern that convictions already validly obtained not be needlessly aborted." See *Jenkins* v. *Delaware*, *supra*, 37 USLW at 4460. In *Jenkins*, this Court was persuaded substantially by "the increased evidentiary burdens

that would result if we were to insist that *Miranda* be applied to retrials." *Ibid.* Similarly, "because of the increased evidentiary burden that would be placed unreasonably upon law enforcement officials" [*ibid.*] by insisting that *Jackson* v. *Denno* be applied retroactively to cases previously disposed of upon pleas of guilty, the *Jackson* case should not apply in the cases at bar.

Plainly, the opinion of the Court of Appeals in the *Ross* case is wholly inconsistent with the recent decision of this Court in *Halliday* v. *United States,* —— U.S. ——, 23 L.Ed.2d 16 (1969). Shortly before *Halliday,* this Court had held that when a guilty plea is accepted in a federal court in violation of Rule 11 of the Federal Rules of Criminal Procedure, the defendant must be afforded an opportunity to plead anew. *McCarthy* v. *United States,* —— U.S. ——, 22 L.Ed.2d 418 (1969). *Halliday* held that *McCarthy* should not be applied to guilty pleas which were accepted prior to the date of the *McCarthy* decision. While acknowledging that strict compliance with Rule 11 unquestionably "enhances the reliability of the voluntariness determination," the Court reaffirmed its pronouncement in *Stovall* v. *Denno, supra,* that the extent to which a " 'condemned practice affects the integrity of the truth-determining process * * * must be * * * weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.' " 23 L.Ed.2d at 20. In the case at bar, the absence of *Jackson* hearings prior to 1964 did not affect the truthfulness of the plea, reliance on the pleading process prior to *Jackson* was clearly justified, and the disruptive impact of retroactivity would be staggering. And since *McCarthy,*

which was designed to enhance the determination of the voluntariness of a judicial confession of guilt, is not retroactive, it follows that *Jackson*, which was designed to facilitate the determination of the voluntariness of a pre-trial confession, should not be retroactive where the conviction rests on a plea of guilty, not on the pre-trial confession. Since *Jackson* does not warrant retroactive application in such cases, the unavailability of *Jackson* hearings has no constitutional significance in assessing a plea of guilty which was entered before *Jackson*. And with *Jackson* removed from consideration, the decisions of the Circuit court crumble.

Conclusion

The petition for certiorari should be granted and the judgments of the Court of Appeals reversed.

Respectfully submitted,

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